Supreme Court, U.S.
FILED

051584 JUN 5 - 2006

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No. 05-

IN THE

Supreme Court of the United States

HOUSING AUTHORITY OF JEFFERSON PARISH, *et al.*,

Petitioners,

v.

CATRICE JOHNSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals erred in holding that participants in the Housing Choice Voucher Program have a federal right that will support a suit to enforce a regulation promulgated by the United States Department of Housing and Urban Development ("HUD") to guide Public Housing Authorities ("PHAs") in the calculation of a utility allowance schedule.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), of the Rules of the Supreme Court of the United States, the following persons and entities are parties to this case:

Plaintiffs-appellants-respondents: Felicia Badon, Niamilka Baker, Mona Blunte, Ira Bordere, Dorothy Brown, Mary Calloway, Dianne Carter, Raymond Carto, Karrie Curtis, Geraldine Dixon, Lula Edwards, Fannie Florant, Rhonda Gloster, Charlene Green, Jynika Jacques, Catrice Johnson, Nicole Johnson, Gaynell Jones, Judy Jones, Delores Love, Sylvia Matteo, Barbara Neal, Barbara Nelson, Tabitha Nelson, Yvette Neveaux, Barbara Palmer, Robin Perkins, Shawanda Renfroe, Yvette Rose, Dorothy Singleton, Regina Singleton, Sophie Smith, Pearlie Mae Stevenson, Bridget Thomas, Margie Varist, Wendy Wallace, Marilyn Williamson, Charlotte Winn, Emelda Woods, Sandra Wyatt, and Theresa Young. Also, Tiffani Brumfield and Bertha Williams who sought leave to join the action pursuant to a motion for leave to file second amended and supplemental complaint.

Defendants-appellees-petitioners: Housing Authority of Jefferson Parish, Jeffrey Trahan, and the Louisiana Housing Development Corporation.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 14.1(b) and 29.6, of the Rules of the Supreme Court of the United States, Louisiana Housing Development Corporation makes the following disclosure:

Louisiana Housing Development Corporation is a privately held corporation and has no parent corporation and no stockholder that is a publicly traded corporation.

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Housing Authority of Jefferson Parish, Louisiana Housing Development Corporation and Jeffrey Trahan, Executive Director of Housing Authority of Jefferson Parish, the petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 6, 2006.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, whose judgment is here sought to be reviewed, is *Johnson v. Housing Authority of Jefferson Parish*, 442 F.3d 356 (5th Cir. 2006) and is printed in Appendix A, page 1a. The judgment of the United States District Court for the Eastern District of Louisiana is printed in Appendix B, page 24a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 6, 2006. No motion for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 1437a Rental Payments:

> **(a) Families included; rent options; minimum amount; occupancy by police officers and over-income families**
>
> (1) Dwelling units assisted under this chapter shall be rented only to families who are low-income families at the time of their initial

occupancy of such units. Reviews of family income shall be made at least annually. Except as provided in paragraph (2) and subject to the requirement under paragraph (3), a family shall pay as rent for a dwelling unit assisted under this chapter (other than a family assisted under section 1437f (o) or (y) of this title or paying rent under section 1437f (c)(3)(B) [1] of this title) the highest of the following amounts, rounded to the nearest dollar:

> **(A)** 30 per centum of the family's monthly adjusted income;
>
> **(B)** 10 per centum of the family's monthly income; or
>
> **(C)** if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

42 U.S.C. § 1437f(o) Voucher Program:

. . .

(2) Amount of monthly assistance payment

Subject to the requirement under section 1437a (a)(3) of this title (relating to minimum rental amount), the monthly assistance payment for a family receiving assistance under this subsection shall be determined as follows:

(A) Tenant-based assistance; rent not exceeding payment standard

For a family receiving tenant-based assistance, if the rent for the family (including the amount allowed for tenant-paid utilities) does not exceed the applicable payment standard established under paragraph (1), the monthly assistance payment for the family shall be equal to the amount by which the rent (including the amount allowed for tenant-paid utilities) exceeds the greatest of the following amounts, rounded to the nearest dollar:

(i) 30 percent of the monthly adjusted income of the family.

(ii) 10 percent of the monthly income of the family.

(iii) If the family is receiving payments for welfare assistance from a public agency and a part of those payments, adjusted in accordance with the actual housing costs of the family, is specifically designated by that agency to meet the housing costs of the family, the portion of those payments that is so designated.

(B) Tenant-based assistance; rent exceeding payment standard

For a family receiving tenant-based assistance, if the rent for the family (including the amount allowed for tenant-paid utilities) exceeds the

applicable payment standard established under paragraph (1), the monthly assistance payment for the family shall be equal to the amount by which the applicable payment standard exceeds the greatest of amounts under clauses (i), (ii), and (iii) of subparagraph (A).

(C) Families receiving project-based assistance

For a family receiving project-based assistance, the rent that the family is required to pay shall be determined in accordance with section 1437a (a)(1) of this title, and the amount of the housing assistance payment shall be determined in accordance with subsection (c)(3) of this section.

24 C.F.R. § 982.517 Utility Allowance Schedule:

(a) *Maintaining schedule.* (1) The PHA must maintain a utility allowance schedule for all tenant-paid utilities (except telephone), for cost of tenant-supplied refrigerators and ranges, and for other tenant-paid housing services (e.g., trash collection (disposal of waste and refuse)).

(2) The PHA must give HUD a copy of the utility allowance schedule. At HUD's request, the PHA also must provide any information or procedures used in preparation of the schedule.

(b) *How allowances are determined.* (1) The utility allowance schedule must be determined based on the typical cost of utilities and services paid by energy-conservative households that

occupy housing of similar size and type in the same locality. In developing the schedule, the PHA must use normal patterns of consumption for the community as a whole and current utility rates.

(2)(i) a PHA's utility allowance schedule, and the utility allowance for an individual family, must include the utilities and services that are necessary in the locality to provide housing that complies with the housing quality standards. However, the PHA may not provide any allowance for non-essential utility costs, such as costs of cable or satellite television.

(ii) In the utility allowance schedule, the PHA must classify utilities and other housing services according to the following general categories: space heating; air conditioning; cooking; water heating; water; sewer; trash collection (disposal of waste and refuse); other electric; refrigerator (cost of tenant-supplied refrigerator); range (cost of tenant-supplied range); and other specified housing services. The PHA must provide a utility allowance for tenant-paid air-conditioning costs if the majority of housing units in the market provide centrally air-conditioned units or there is appropriate wiring for tenant-installed air conditioners.

(3) The cost of each utility and housing service category must be stated separately. For each of these categories, the utility allowance schedule must take into consideration unit size (by number of bedrooms), and unit types (e.g., apartment, row-

house, town house, single-family detached, and manufactured housing) that are typical in the community.

(4) The utility allowance schedule must be prepared and submitted in accordance with HUD requirements on the form prescribed by HUD.

(c) *Revisions of utility allowance schedule.* (1) a PHA must review its schedule of utility allowances each year, and must revise its allowance for a utility category if there PHAs been a change of 10 percent or more in the utility rate since the last time the utility allowance schedule was revised. The PHA must maintain information supporting its annual review of utility allowances and any revisions made in its utility allowance schedule.

(2) At HUD's direction, the PHA must revise the utility allowance schedule to correct any errors, or as necessary to update the schedule.

(d) *Use of utility allowance schedule.* (1) The PHA must use the appropriate utility allowance for the size of dwelling unit actually leased by the family (rather than the family unit size as determined under the PHA subsidy standards).

(2) At reexamination, the PHA must use the PHA current utility allowance schedule.

(e) *Higher utility allowance as reasonable accommodation for a person with disabilities.* On request from a family that includes a person with disabilities, the PHA must approve a utility allowance which is higher than the applicable amount on the utility allowance schedule if a higher utility allowance is needed as a reasonable accommodation in accordance with 24 CFR part 8 to make the program accessible to and usable by the family member with a disability.

STATEMENT OF THE CASE

Petitioner Housing Authority of Jefferson Parish ("HAJP") is a public housing authority ("PHA") created under the laws of the State of Louisiana and Petitioner Jeffrey Trahan is its Executive Director. Petitioner Louisiana Housing Development Corporation ("LHDC") is a privately held corporation organized under the laws of the State of Louisiana and, pursuant to a contract with HAJP, operates the Jefferson Parish Housing Choice Voucher Program ("JPHC Voucher Program").

Respondents are alleged to be current or former participants in the JPHC Voucher Program. Respondents brought this suit to redress Petitioners' alleged violations of the United States Department of Housing and Urban Development ("HUD") regulation that provides guidance to Public Housing Authorities ("PHAs") in the manner of calculating and revising the utility allowance schedule utilized by Petitioners. Specifically, Respondents alleged that Petitioners failed to base the utility allowance schedule on current utility rates and failed to revise the utility allowance schedule when those rates increased by ten percent or more as required by 24 C.F.R. § 982.517(b) & (c).

A. Factual Background

The JPHC Voucher Program makes payments to a participant's landlord through a housing assistance payment ("HAP") contract entered into between HAJP and the landlord. 42 U.S.C. § 1437f(b)(1). The contents of this contract are governed by statute, 42 U.S.C. § 1437f(c) – (h) and regulation 24 C.F.R. § 982.451 – 982.456. Participants and their families have no third party beneficiary rights in the HAP contract. *Id.* Unless a waiver is obtained from HUD, the maximum monthly rent a landlord may receive for a unit may not exceed the fair market rent established by HUD by more than ten percent. 42 U.S.C. § 1437f(c)(1). A PHA is required to adopt a payment standard that is usually not greater than 110 percent or less than 90 percent of the fair market rent established by HUD, but may adopt a lower or higher payment standard with HUD's approval. 42 U.S.C. § 1437f(o)(1). The payment standard is the maximum monthly subsidy. 24 C.F.R. § 982.505(a).

The amount of the payment under the HAP contract is calculated using the formula provided in the statute, 42 U.S.C. § 1437f(o)(2), and regulation, 24 C.F.R. § 982.505(b). The formula set forth in the statute is the minimum amount the participant must pay toward rent and utilities and is termed "total tenant payment[1]" by HUD.

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1. "Total tenant payment" is somewhat of a misnomer when applied to the Voucher Program. The term was defined for use in the project-based program and the tenant-based Certificate Program, which had a ceiling on the amount the participant paid. In the Voucher Program it is the minimum amount a tenant must pay and the tenant may be required to pay more if the dwelling chosen by the tenant requires a greater payment. The term is a carry over from the now extinct Certificate Program.

24 C.F.R. § 5.628. The amount of the housing assistance payment is the lesser of 1) the payment standard minus the total tenant payment or 2) the rent to the owner plus the utility allowance minus the total tenant payment. 24 C.F.R. § 982.505(b). The housing assistance payment is made directly to the landlord by the PHA and may not exceed the rent due to the owner. 24 C.F.R. § 982.514(a). If the housing assistance payment exceeds the rent to the owner, then the PHA pays the balance either directly to the participant or directly to the utility supplier on behalf of the participant.

The utility allowance used in the formula is based on the size of the unit and types of utilities available in the unit in the amounts adopted by the PHA as its utility allowance schedule. 24 C.F.R. § 982.517. Through the affidavit of Bobbie Robinson, Programs Director for the Jefferson Parish office of LHDC, Petitioners established that HAJP's utility allowance is an estimate of utility costs "based on the typical cost of utilities and services paid by energy-conservative households of similar size dwellings in Jefferson Parish." Affidavit of Bobbie Robinson attached to Motion to Dismiss, p.1. Ms. Robinson also testified that the utility allowance was increased only when there had been an increase of ten percent or more from the previous schedule, the last such increase having occurred in March 2004. *Id.*

A participant is given an opportunity for a hearing if he disagrees with the PHA's determination of the appropriate utility allowance from the utility allowance schedule, 24 C.F.R. § 982.555(a)(1)(ii), but is not afforded a hearing to dispute the "[e]stablishment of the PHA schedule of utility allowances for families in the program", 24 C.F.R. § 982.555(b)(3). Through this suit, Respondents seek to do that which HUD regulations will not allow: challenge the calculation of Petitioners' utility allowance schedule.

B. Procedural Background

Respondents alleged jurisdiction in the district court pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and 1337 for causes of action claimed to have arisen under the Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*, as amended, and 42 U.S.C. § 1983. Respondents contended that the regulation governing the calculation of the utility allowance schedule (24 C.F.R. § 982.517) in conjunction with the statute that sets forth the formula for calculating the amount of the subsidy to be paid to the landlord (42 U.S.C. § 1437f(o)(2)) creates a federal right enforceable through 42 U.S.C. § 1983, relying on *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987).

Petitioners' answer contained a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. Specifically, Petitioners contended that a regulation alone can not create a federal right subject to enforcement through § 1983 and that 42 U.S.C. § 1437f(o)(2), when analyzed under the factors set forth by this court in *Blessing v. Freestone*, 520 U.S. 329 (1997), does not contain the requisite enforceable federal right to support a § 1983 suit for violation of civil rights. Petitioners also challenged the standing of 12 of the Respondents because they had received the maximum subsidy allowed and any increase in the utility allowance schedule would not result in an increase in those Respondents' subsidies. Thus, they were not harmed by any alleged under-calculation of the utility allowance schedule.

The trial court agreed with Petitioners and granted their motion to dismiss pursuant to rule 12(b)(1) and (6), Federal Rules of Civil Procedure based on the absence of a federal right to support a § 1983 suit for civil rights violations.

Respondents appealed this order to the United States Court of Appeals for the Fifth Circuit who had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

The Fifth Circuit held that this case was governed by this Court's opinion in *Wright*. *Wright* involved the statutory formula specified to determine the maximum amount of rent a tenant in a housing project could be required to pay (42 U.S.C. § 1437a(a)). 479 U.S. at 430. The federal right that served as the basis for the civil rights suit in *Wright* was the tenant's right to pay no more than 30% of his income in rent. The statutory formula specified in the Housing Choice Voucher Program uses language similar to that contained in the project-based program to determine the amount of the subsidy paid to the landlord under the HAP contract; however, its purpose in the Housing Choice Voucher Program is to insure that participants pay at least 30% of their income in rent. What is a ceiling in the project-based program is a floor in the Housing Choice Voucher Program. Thus, the right to pay no more than 30% of income in rent that formed the basis for a civil rights suit in *Wright*, does not exist in the Housing Choice Voucher Program. The Fifth Circuit found this to be a distinction without a difference. However, the absence of the federal right on which the civil rights suit was predicated in *Wright* forecloses a civil rights suit in the present case.

REASONS FOR GRANTING THE PETITION

This is a case of first impression with substantial impact on PHAs nationwide. The judgment of the Fifth Circuit opens a floodgate of litigation allowing voucher program participants to sue PHAs over virtually every program regulation promulgated by HUD and effectively sidelines HUD's role in the operation of PHAs, giving that role to federal courts. The Fifth Circuit does so in misguided reliance on *Wright*, 479 U.S. 418, with only a nod to this Court's more recent and compelling guidance in *Blessing*, 520 U.S. 329, *Alexander v. Sandoval*, 532 U.S. 275 (2001) and *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

A. This Case Raises The Critically Important Question Of Whether The Housing Choice Voucher Program Creates A Federal Right That Will Allow Participants To Challenge The Application Of Virtually Every Program Regulation.

The statute in question in this case is the formula contained in the Housing Choice Voucher Program to determine the amount of the subsidy to be paid by the PHA to the landlord on behalf of a participant. Respondents do not challenge the application of this statute to them. Rather they seek to reach through the statute to a HUD regulation that provides guidance to PHAs as to the manner of calculating a utility allowance schedule and supplant HUD as the supervisor of utility allowance schedules. The language used in this formula is almost identical to the language used in the formula for the project-based program in *Wright*. However, the similarities end there as the formula serves very different purposes in the two programs.

The federal right that formed the basis of the right to sue in *Wright* is not present in the voucher program. *Wright* involved a provision of the project-based housing program that placed a ceiling on the amount a PHA could charge a participant for rent for an apartment in a building owned by the PHA. 479 U.S. at 425. The Court found that the statute made an unambiguous grant to participants of the right to pay no more than 30% of adjusted income for rent. *Id.* at 430. Some PHAs began to charge an excess utility use fee to participants whose utility usage exceeded a specified amount. That excess utility surcharge raised the combined rent and utilities fee above the 30% ceiling contained in the statute. The issue was whether the term rent in the statute included an amount for utilities. The Court looked to HUD regulations as an agency interpretation of the statute to find the term rent included an amount for utilities. Thus, a PHA could not charge a participant an amount for rent and utilities, including excess utility fees, which exceeded the statutory ceiling.

In the voucher program, the participants have no absolute right to a maximum out-of-pocket payment, but rather are required to make a minimum out-of-pocket payment of at least 30% of their adjusted income in rent. The 30% of adjusted income calculation in the project-based program is the maximum a participant can be required to pay to a PHA for rent and utilities. The 30% of adjusted income calculation in the voucher program is the minimum a participant is required to pay to the landlord for rent and utilities. The Fifth Circuit simply found that the similar language compelled a similar result without any real analysis of the very different functions this language has in the two statutes. The unambiguous right to pay no more than 30% of income in rent that the Court found so compelling in *Wright* simply is not present in the voucher program, despite the similarity of language.

In her dissenting opinion in *Wright*, Justice O'Conner was concerned that "once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result." 479 U.S. at 438 (emphasis in original). Justice O'Conner's fears are coming true. The Fifth Circuit's judgment allows these participants to reach through the statute to enforce a regulation that HUD promulgated to provide guidance to PHAs in the calculation of a utility allowance schedule. The provisions of the regulation are not strictly enforceable in that HUD may grant a waiver of one or more of the regulation's provisions.

B. The Fifth Circuit's Opinion Is Contrary To This Court's Holdings In *Blessing*, *Alexander* And *Gonzaga University*.

In *Blessing* a unanimous Court recognized three factors to be considered when determining whether a statute confers a federal right enforceable through § 1983:

> 1. Congress must have intended that the provision in question benefit the plaintiff;
>
> 2. The plaintiff must demonstrate that the right protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence; and
>
> 3. The statute must unambiguously impose a binding obligation on the States.

520 U.S. at 340-41. The Court stressed that only a violation of a "federal *right*, not merely a violation of federal *law*" is

enforceable through § 1983. *Id.* at 340. (emphasis in original) Five years later the Court noted confusion had arisen as some courts interpreted *Blessing* to allow plaintiffs to enforce a statute under § 1983 "so long as the plaintiff falls within the general zone of interest that the statute is intended to protect." *Gonzaga Univ.*, 536 U.S. at 283. The Court specifically rejected the notion that "anything short of an unambiguously conferred right" can support a cause of action under § 1983. *Id.* Accordingly the Court held that "it is *rights*, not the broader or vaguer 'benefits' or 'interests' that may be enforced under the authority of [§ 1983]." *Id.* (emphasis in original).

As the trial court in this case recognized, Respondents are in the zone of interest Congress intended to protect, but the statute does not contain the unambiguous rights-creating language required to create a federal right. *Johnson v. Housing Auth. of Jefferson Parish*, 2004 U.S. Dist. LEXIS 21713, p. 27 (E.D. La., 2004), *rev'd*, 442 F.3d 356 (5th Cir. 2006) (Appendix B, p. 47a). The trial court further found that unlike the statute in *Wright*, the statute at issue here "is not phrased using right-creating language, but rather is framed as a command on how the monthly assistance payments are to be determined." *Id.* at 28 (Appendix B, p. 48a). The rights-creating language at the core of *Wright* was the command that "a family shall pay rent . . ." that the Court interpreted to be a mandatory ceiling on the amount a family could be required to pay. The formula to determine the maximum amount the family must pay followed. The formula per se was not the federal right to be enforced, but rather the cap on the family's out-of-pocket expense.

The Fifth Circuit focused on the language of the formula, and finding it to be identical to the formula at issue in *Wright*, declared that *Wright* controlled in this case. *Johnson v.*

Housing Auth. of Jefferson Parish, 442 F.3d 356, 360-61 (5th Cir. 2006) (Appendix B, pp. 8a-10a). The language in the statute at issue here is not a cap on the family's out-of-pocket expense, but rather a required minimum family out-of-pocket expense. It provides that "the monthly assistance payment for the family shall be equal to the amount by which the rent (including the amount allowed for tenant-paid utilities) exceeds the greatest of . . ." followed by the formula. The cap in this statute is on the amount of assistance available, not to exceed the payment standard. The family controls the size of its out-of-pocket expense through its choice of dwelling. Those who choose a dwelling for which the rent exceeds the payment standard receive no utility allowance. This is the case for five of the present Respondents. (Robinson affidavit, p. 2). Those who choose a dwelling for which the rent plus the utility allowance exceeds the payment standard likewise will not have their rent burden decreased by an increase in the utility allowance. This is the case for seven of the present Respondents. *Id.* Under the Fifth Circuit's judgment even participants unaffected by the application of a regulation may sue to challenge it.

This statute also operates differently than the statute at issue in *Wright*. Whereas the statute in *Wright* addressed a direct relationship between the participant and the PHA (i.e., how much the participant must pay the PHA), this statute addresses the relationship between the PHA and the landlord (i.e., how much the PHA will pay a landlord under a HAP contract) and only indirectly the participant who benefits from the payment to the landlord. This type of indirect benefit is not the type of unambiguous rights-creating language required by this Court in *Gonzaga*. This reasoning becomes even more compelling when it is apparent that Respondents are not seeking review of the statute, but rather are seeking review

of a regulation that governs the relationship between HUD and the PHAs.

Subject to the payment standard cap, Respondents' subsidies admittedly include the "amount allowed for tenant-paid utilities" required by statute. They simply disagree with Petitioners' utility allowance schedule. This suit is not to enforce a federal right to receive "the amount allowed for tenant-paid utilities," but rather is a suit to enforce a HUD regulation, usurping HUD's authority over its own regulations.

The second *Blessing* factor addresses judicial competency. Again relying on *Wright*, the Fifth Circuit held that review of the utility allowance schedule was not beyond judicial competency. *Johnson*, 442 F.3d at 364 (Appendix A, pp. 16a-17a). However the utility allowance schedule per se was not at issue in *Wright*. The issue was whether utilities were included in the term "rent" in the statute. That is not an issue in the present case because the statute at issue expressly includes "the amount allowed for tenant-paid utilities." The question is whether the courts are equipped to determine such issues as "normal patterns of consumption" and which are "energy-conservative households" as set out in the HUD guidelines to determine what an appropriate utility allowance should be. The regulation does not specify any particular manner or method of collecting this information, nor does it specify any particular manner or method of analyzing this information once collected; however, HUD has provided suggested ways to satisfy this regulation which Respondent's have followed.

Respondents have suggested that PHAs should be required to insert an "expert" into this process, and of course at least one expert would be required to assist the court should

it venture into this foray. But this is contrary to HUD's intent. In testimony before Congress, John Ols, Jr., a HUD Director stated that a PHA's "method of data collection is influenced by staff availability, cost, accessibility of the data and other factors. Requiring one source of data over another could be, in our opinion, counterproductive." *Utility Allowances Provided to Public Housing and Section 8 Households and Resulting Rent Burdens Before the Subcommittee of Housing and Community Development; Committee on Banking, Finance and Urban Affairs, House of Representatives, 100th Cong. 9 (1990) (statement of John M. Ols, Jr., Director of Housing and Community Development Issues Resources, Community, and Economic Development Division), available at* http://archive.gao.gov/t2pbat1/140801 .pdf.

Is a court equipped to examine utility rates from 1995 forward to determine if there has been an increase of more than 10 percent in any given year as Respondents are requesting in this case? What is an energy-conservative household? What are the similar size and types of housing in the locality? What are normal consumption patterns? Should the court substitute its judgment for the discretion of the PHA and HUD? Is there one absolute number or is there a range in which the allowance would be in compliance to allow for some discretion? If there is a range, how wide of a range is there? Courts are poorly equipped to handle this type of determination without the assistance of numerous retained experts and to resort to such would be an unwarranted waste of resources given the broad discretion given to HUD and PHAs in the matter.

The third *Blessing* factor is a binding obligation in mandatory terms. There is a binding obligation to include "the amount allowed for tenant-paid utilities" when

calculating the subsidy to be paid under the HAP contract to the landlord. But as noted above, Respondents are not claiming they do not receive such an allowance. Rather they claim entitlement to a particular allowance while neither the statute not the regulation guarantees a particular utility allowance schedule. By the very nature of the components of the allowance schedule, a PHA has wide discretion in determining the actual dollar amounts. Even then, HUD may grant a waiver of this regulation's requirements when its implementation would strain a PHA's allocated funds. *See* HUD Notice 2005-9, p.3 (Appendix C, pp. 59a-60a). A PHA could simply seek a waiver of any increase required by the regulation that would exceed its allocated funds for the time period. HUD has historically encouraged a conservative approach to the calculation of the utility allowance schedule. *Id.* Clearly the regulation Respondents seek to enforce does not impose a binding obligation in mandatory terms on PHAs.

Under this Court's holdings in *Blessing* and *Gonzaga*, no congressional intent to confer a federal right can be found in the statute. A regulation alone cannot be the source of an enforceable federal right. As this Court held in *Alexander*, "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." 532 U.S. at 291. Creation of federal rights through a federal statute has always been held to be a matter of congressional intent from the inception of the doctrine in § 1983 suits in *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) through the court's more recent pronouncement in *Gonzaga*, 56 U.S. at 283. Although the interpretation given to a statute by the agency charged with its execution is a traditional aid in statutory interpretation, it is no substitute for the clear and unambiguous statutory language required to create a federal

right so recently clarified by the Court in *Gonzaga*. *Id.* at 284. If HUD regulations are determinative of whether a private cause of action exists to challenge a PHA's utility allowance schedule, then HUD has clearly and consistently precluded such challenges by excluding them from the grievance process. *Wright*, 479 U.S. at 439 (O'Connor, J. dissenting); 24 C.F.R. § 982.555(b)(3).

C. There Is No Need For Private Suits To Enforce HUD's Utility Allowance Schedule As Such Suits Are Futile And A Waste Of PHA And Judicial Resources.

Given the nature of the funding of the Housing Choice Voucher Program and the broad discretion given to HUD and PHAs to administer the program, suits challenging the utility allowance schedule are futile and a waste of both PHA and judicial resources. A PHA is granted a set amount of money with which to operate the program from HUD through an Annual Contributions Contract ("ACC"). *See* Robinson affidavit, Exhibit 3. Not everyone who qualifies for assistance receives it and there is a waiting list of qualified applicants to absorb every available program dollar. Discretion is given to the PHA to keep its payment standard and utility allowance schedule at a level that will allow it to best serve the needs of its community.

Historically, Petitioners have exercised their discretion to keep the payment standard low at ninety percent of FMR and their utility allowance schedule conservative. This has allowed Petitioners to assist more qualified applicants and keep more units enrolled in the program. The difficulty has always been to locate landlords with qualified units who are willing to participate in the program. Once a unit is in the program, a PHA strives to keep it there. Needless to say, if the utility

allowance schedule is increased and there is no concomitant increase in the ACC, there will not be enough funds to both pay the increased utility allowance and keep all of the participants in the program. When participants are cut from the program and not replaced from the waiting list, the units are lost and are difficult to regain.

HUD, under a mandate from Congress, has encouraged PHAs to stay within ever shrinking budgets and yet meet the needs of current participants by reducing their payment standards and re-examining their utility allowances. HUD Notice 2005-9 (Appendix C, pp. 57a-60a). HUD has declared the requirements of section 982.517 to be regulatory and not statutory, and thus subject to waiver. *Id.* at pp. 59a-60a. HUD encourages PHAs experiencing financial difficulties to seek a waiver of these requirements. *Id.* In that same notice HUD recognizes the termination of assistance as a necessary means to keep a PHA within budget. *Id.* at 63a. It would truly be unfortunate if one of the Petitioners had to be terminated due to lack of program funds under the Respondents' termination policy as stated in the administrative plan.

Should a court determine that Petitioners so abused their discretion in the calculation of the utility allowance that it must be increased to conform to the requirements of the regulation, Petitioners will have no alternative but to seek a waiver from HUD. It is a zero sum game. There is only so much funding in the program and Petitioners will take the available steps to continue service to current participants. Termination of existing HAP contracts is the option of last resort.

This is a lose-lose situation all the way around. Should this type of suit be allowed to go forward, tremendous sums

will be spent on experts and attorneys fees in litigation, to what end? Already cash-strapped PHAs will only become more so if their discretionary management decisions are subject to court review. Did Congress truly intend to allow private suits by a few participants to force management decisions that give them a greater subsidy while keeping others from entering the program, or worse, forcing others out of the program? Surely Congress intended HUD and PHAs to make management decisions to assist the greatest number of participants possible as indicated in the sections of the Conference Report on the Consolidated Appropriations Act, 2005, quoted in HUD Notice 2005-9 (Appendix C, pp. 56a-57a).

This suit exemplifies the unchecked intrusion into policy decisions which govern a PHA's day to day operations feared by Justice O'Conner. *Wright*, 479 U.S. at 438 (O'Conner, J. dissenting). Simply stated, there is no Congressional intent to allow participants to sue PHAs over policy decisions designed to promote the greatest good for the greatest number of participants. The subsidy includes an amount for tenant-paid utilities, not a particular amount or even actual utilities paid. Congress left the determination of what that amount should be to HUD, who in turn gave guidance to PHAs in how to determine the appropriate amount. This guidance is, according to HUD, regulatory and not statutory, and thus subject to waiver by HUD. Such regulatory guidance is not the foundation that will support a § 1983 suit for violation of civil rights.

CONCLUSION

For the above and foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 6, 2006

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-31201

CATRICE JOHNSON, ET AL.

Plaintiffs-Appellants,

versus

HOUSING AUTHORITY OF JEFFERSON PARISH, ET AL.

Defendants-Appellees.

March 6, 2006, Filed

OPINION

WIENER, Circuit Judge:

The sole question for us to decide in this appeal is whether participants in the federal Housing Act voucher program (the "voucher program") may bring a private action under 42 U.S.C. § 1983[1] to challenge the calculation of their

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1. Section 1983 provides in relevant part:

> Every person who, under color of [state law] subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction

(Cont'd)

utility allowances by public housing authorities under § 1437f(o)(2) of the United States Housing Act[2] and implementing regulations.[3] In answering this question, we need not and therefore do not reach the merits of the participating tenants' underlying challenge; our inquiry is limited to whether Plaintiffs-Appellants have a private right of action.[4] Concluding that they do, we reverse the district court and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

Plaintiffs-Appellants live in Jefferson Parish, Louisiana, and participate in the voucher program under Section 8. Their residential rents and utility expenses are subsidized through federally-funded vouchers provided by the U.S. Department of Housing and Urban Development (HUD), administered

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> thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.* (2005).

3. 24 C.F.R. § 982.517 *et seq.*

4. See *Morse v. Republican Party*, 517 U.S. 186, 234-35, 116 S. Ct. 1186, 134 L. Ed. 2d 347 (1996) (deciding only whether there existed a private cause of action and "postponing any consideration of the merits until after they have been addressed by the District Court").

locally by Defendant-Appellee Housing Authority of Jefferson Parish, a public housing authority created by state law. Another Defendant-Appellee, the Louisiana Housing Development Corporation, is a privately held corporation that contracts with the Housing Authority to operate the voucher program in Jefferson Parish.

This "tenant-based" voucher program differs from traditional "project-based" public housing programs by assisting families meeting the statute's low-income standard in renting housing in the private market. The voucher program thus gives participants the flexibility to choose among a variety of housing options. Further, unlike earlier tenant-based programs, which featured a statutory cap that limited a family's permissible housing costs to 30 percent of adjusted monthly income, the current voucher program contains no such cap. It gives participants even greater flexibility in the housing market as well as access to more expensive units that better meet their needs. Under the current program, participating families must contribute at least 30 percent of their adjusted monthly incomes to housing costs, and they may — but need not — spend more. Therefore, the choice of renting a costlier unit is entirely theirs.

In administering the voucher program, the public housing authority issues vouchers that are payable directly to a participant's landlord under a housing assistance payment contract ("HAP contract"), the terms of which are governed by the statute and regulations.[5] Generally, the amount of this payment is calculated as "the amount by which the rent

5. See 42 U.S.C. § 1437f(c)-(h); 24 C.F.R. § 982.451-456.

(including the amount allowed for tenant-paid utilities) exceeds . . . 30 percent of the monthly adjusted income of the family."[6] The "amount allowed for tenant-paid utilities" is determined by the public housing authority, which is directed by regulation to base the utility allowance "on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality . . . using normal patterns of consumption for the community as a whole and current utility rates."[7] The public housing authority is further required to "review its schedule of utility allowances each year, and must revise its allowance for a utility category if there has been a change of 10 percent or more in the utility rate since the last time the utility allowance schedule was revised."[8]

Plaintiffs-Appellants filed the instant lawsuit in the Eastern District of Louisiana in April of 2004, alleging that Defendants-Appellees (collectively, the "Housing Authority") had not provided them appropriate utility allowances as required by the statute and regulations. Specifically, they contend that the Housing Authority has failed to use current utility rates in calculating the utility

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6. 42 U.S.C. § 1437f(o)(2). Any excess housing costs above a limit referred to as the "payment standard," which is established by HUD and based on fair market value, are borne by the participant. In that situation the family's contribution would be greater than 30 percent of adjusted income, which the voucher program permits at the participant's option. See id. § 1437f(o)(2)(B).

7. 24 C.F.R. § 982.517(b)(1).

8. Id. § 982.517(c)(1).

allowance, and that it had not revised its utility allowance schedule from 1995 to 2004 despite annual increases in utility rates of 10 percent or more in several years during that period.[9] The result, insist Plaintiffs-Appellants, is that their rent burdens have been higher than they would have been had the Housing Authority complied with the statute and the implementing regulations, which these participants seek to enforce through their lawsuit.

In October of 2004, the district court, without oral argument or hearing, granted the Housing Authority's motion to dismiss under Rules 12(b)(1) and (6).[10] The district court held that the portions of the voucher program statute and implementing regulations pertaining to the utility allowance do not create individual federal rights that may be enforced by private participants through a § 1983 action. The district court also denied Plaintiffs-Appellants' motion for leave to file a second amended complaint raising the same challenge.

II. STANDARD OF REVIEW

We review a district court's dismissal of a complaint under Rules 12(b)(1) and (6) de novo, taking the allegations of the dismissed complaint to be true.[11]

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9. Plaintiffs-Appellants note in their brief on appeal that the housing authorities of neighboring New Orleans and Kenner had raised their utility allowances at least three times since 1995.

10. Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction); Fed. R. Civ. P. 12(b)(6) (failure to state a claim upon which relief can be granted).

11. *Vander Zee v. Reno*, 73 F.3d 1365, 1368 (5th Cir. 1996).

were applied in evaluating a provision of the Family Educational Rights and Privacy Act, the Court unsurprisingly held that the statutory language on which the plaintiffs relied does not support an action under § 1983.[18]

We recognize at the outset, therefore, that the result we reach in this case is a rarity, particularly after Gonzaga. We are nevertheless convinced that its resolution is controlled by the Supreme Court's pre-Gonzaga decision in *Wright v. City of Roanoke Redevelopment & Housing Authority*.[19] In that case, the Court interpreted a provision of the Housing Act that is virtually identical to the one at issue here, to support (1) a § 1983 challenge (2) brought by public housing tenants concerning (3) the calculation of their utility allowances. As Wright predated Blessing by a decade the Court could not have applied the "Blessing test" under that name, yet the Court's analysis in Wright is wholly consistent with that employed in more recent cases, and indeed constitutes an indispensable element of the current methodology.[20] Moreover, Gonzaga expressly relied on Wright, pointing to it as a paradigmatic example of an appropriate case for finding the presence of a private right of action under § 1983[21] and leaving no doubt that Wright survives as good law.

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18. See id. at 287-90.

19. 479 U.S. 418, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987).

20. See *Blessing*, 520 U.S. at 340-41 (citing Wright as direct authority for the first two factors to be considered in the enforceable rights analysis); see also *Gonzaga*, 536 U.S. at 280 (approving of the analysis and outcome in Wright).

21. See *Gonzaga*, 536 U.S. at 280.

Appendix A

A. Wright Dictates the Outcome in this Case

The plaintiffs in *Wright* were tenants in low-income housing projects owned by the City of Roanoke Redevelopment and Housing Authority. They sued the Authority under § 1983, alleging that it over-billed them for their utilities and thereby violated the statutory rent ceiling that limited their rent to 30 percent of their adjusted monthly income. The statutory language at issue, commonly referred to as the Brooke Amendment, stated that "[a] family shall pay as rent for a dwelling unit assisted under this chapter (other than a family assisted under section 1437f(o)[22] of this title) . . . 30 per centum of the family's monthly adjusted income. . . ."[23] The implementing HUD regulation, in turn, specified that the statutory term "rent" included "reasonable amounts of utilities determined in accordance with the [public housing authority's] schedule of allowances for utilities supplied by the project."[24]

The Supreme Court in Wright concluded that "it is clear that the regulations gave low-income tenants an enforceable

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22. Section 1437f(o), which is expressly set apart and excluded from coverage under the Brooke Amendment, applies to the housing choice voucher program and is the provision at issue in the present case.

23. 42 U.S.C. § 1437a(a) (1982) (quoted in *Wright*, 479 U.S. at 420 n.2) (footnote added).

24. 24 C.F.R. § 860.403 (1982) (quoted in *Wright*, 479 U.S. at 420 n.3). The Supreme Court observed that "HUD has consistently considered 'rent' to include a reasonable amount for the use of utilities. . . ." 479 U.S. at 420.

right to a reasonable utility allowance and that the regulations were fully authorized by the statute."[25] The Court found "nothing in the Housing Act or the Brooke Amendment evidencing that Congress intended to preclude petitioners' § 1983 claim. . . ."[26] It emphasized that "the Brooke Amendment could not be clearer . . . [It] was a mandatory limitation focusing on the individual family and its income. The intent to benefit tenants is undeniable."[27] The Court expressly determined that "the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under *Pennhurst* and § 1983, rights that are not . . . beyond the competence of the judiciary to enforce."[28] The Court was also unconvinced that "the remedial mechanisms provided [in the Housing Act were] sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action for the enforcement of tenants' rights secured by federal law."[29]

Plaintiffs-Appellants in the instant case rely heavily on the Wright precedent in arguing that they, too, have an enforceable right under the Housing Act to challenge the calculation of the utility allowance schedule. The Housing Authority's responsive attempt to distinguish Wright is

25. 479 U.S. at 420 (emphasis added).

26. Id. at 429.

27. Id. at 430.

28. Id. at 432.

29. Id. at 425.

unconvincing. Although there are differences between the statutory provision involved in Wright and the one at issue here, our careful review of both convinces us beyond cavil that, in adopting the voucher program, Congress intended to create enforceable rights in participating tenants to the same extent as it did in enacting the statute implicated in Wright.

The key distinction upon which the Housing Authority relies is the statutory cap limiting a participating family's rent to 30 percent of adjusted monthly income under the Brooke Amendment (the provision at issue in Wright), while under § 1437f(o) (the voucher program at issue here) a family may choose to pay a greater percentage of its income for housing. This is a classic distinction without a difference. In no way does it compel the conclusion that § 1437f(o)(2) does not create a federal right that can be enforced through § 1983.

We discern no meaningful difference between the statutory entitlement of the plaintiffs in Wright and that of Plaintiffs-Appellants here, regardless of the fact that the latter entitlement gives participants more choices. The effect of an insufficient utility allowance is the same in either case: Participants are forced to pay more out of pocket than 30 percent of their incomes for housing.[30] Further, even though

30. Even a voucher program participant who is willing to pay more than 30 percent of his income for housing might still be affected by an insufficient utility allowance. For such participants, the monthly assistance payment is equal to the amount of the payment standard established by HUD, minus 30 percent of income. 42 U.S.C. § 1437f(o)(2)(B).

Although a participant whose rent alone (exclusive of the utility allowance) exceeds the payment standard is not at all affected by

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the government housing assistance provided under the voucher program is located in a different section of the Housing Act, when we take the entirety of the legislative enactment into account,[31] we see that Congress acted with precisely the same overarching intent in both sections, viz., to assist low-income families in obtaining a decent place to live.[32] Logic prevents the conclusion that Congress could have intended to create enforceable rights for one group of

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the utility allowance, one whose rent is below the standard but by an amount less than the properly-calculated utility allowance, might be affected by an insufficient allowance. To illustrate this point, assume hypothetically a payment standard of $ 1000, apartment rent of $ 800, utility allowance of $ 150, and a monthly income of $ 666.67. Under these assumptions, the monthly assistance payment would be $ 750 ((800+150) - (30% of 666.67)). If, however, it were later determined that the assumed $ 150 utility allowance was improperly calculated, and that it should have instead been $ 275, the monthly assistance payment would rise to $ 800; the participant could now "max out" his benefit even though he would be paying more than 30% of his income towards housing costs. He would get the full amount of the payment standard minus 30% of income and would be responsible for any costs above the payment standard, $ 75 in this example.

31. See *Suter*, *supra* note 13, at 357 ("The opinion[] in . . . Wright . . . took pains to analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question created 'enforceable rights, privileges, or immunities within the meaning of § 1983.") (emphasis added).

32. See 42 U.S.C. § 1437f(a) (statement of purpose for low income housing assistance); see also id. § 1437(a) (declaration of policy for general program of assisted housing).

Housing Act rental assistance recipients but not the other. Indeed, in the voucher program Congress essentially validated Wright's holding.[33] The Supreme Court's holding in *Wright* that Congress intended for the complaining tenants to have an enforceable right under the Housing Act and thus be able to challenge the calculation of the utility allowance schedule, applies with equal force to the instant case.

(1) Congressional Intent to Benefit Plaintiffs

Congress's intent to provide meaningful housing assistance benefits to individual families participating in the voucher program is just as undeniable as it was with respect to families covered under the Brooke Amendment. The statutory language could not be clearer in providing for "the monthly assistance payment for a family receiving assistance."[34] Still, the Housing Authority argues in its appellate brief that Congress did not so clearly intend to

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33. In determining the legislative intent underlying the enactment of the voucher program, we assume that Congress was aware of the Supreme Court's prior decision in Wright and that the Court's interpretation of the Brooke Amendment in that decision is reflected in the voucher program statute. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."). Indeed, Congress's awareness of Wright is evidenced by its express provision — in the language of the voucher program statute itself — for the "amount allowed for tenant-paid utilities," which was not present in the Brooke Amendment but was implied by the Court in Wright. See *Wright*, 479 U.S. at 420.

34. 42 U.S.C. § 1437f(o)(2).

benefit voucher program participants because the statutory language "addresses rights and duties that flow between the [public housing authority] and the landlord, while the participants are indirect beneficiaries."[35] According to the Housing Authority, the statute's "focus is on fair compensation to the landlord. Rather than being concerned with the needs of these individuals, the statute is concerned with requiring these individuals to pay what Congress has determined to be their fair share of the rent."

This distortion of the statute flies in the face of its plain language. The fact that the assistance payments happen to be disbursed directly to the landlord rather than to the tenant is of no consequence. Congress plainly expressed its intent to provide housing assistance for the benefit of the low-income families participating in the program[36]; it would be absurd to treat the voucher program as a landlords' relief act!

If anything, the benefit to participants under § 1437f(o)(2) is even more direct than the benefit that the Supreme Court

35. The Housing Authority also notes that HUD regulations expressly deny voucher program participants third party beneficiary rights in the HAP contract between the public housing authority and the landlord, citing 24 C.F.R. § 982.456. The effect of this limitation, however, is only that voucher recipients are precluded from "asserting any claim . . . under the HAP contract," id. § 982.456(c) (emphasis added); it has no bearing on Congress's intent to provide housing assistance for their benefit.

36. The text of the statute, in providing for "the monthly assistance payment for a family," is undoubtedly "phrased in terms of the persons benefited." See *Gonzaga*, 536 U.S. at 284 (quoting *Cannon*, 441 U.S. at 692 n.13).

so construed in Wright. The Court observed that the Brooke Amendment "was a mandatory limitation focusing on the individual family and its income."[37] The language of that amendment that the Court held to provide an undeniable benefit stated only that "[a] family shall pay as rent . . . 30 per centum of the family's monthly adjusted income"[38]; the government assistance to cover any remaining housing costs was merely implied. In contrast, the benefit provided by the statutory language of the voucher program is undeniably direct. Its object is the "monthly assistance payment for a family," a tangible, government-funded benefit focused directly on the family. Even though the voucher is made payable to the landlord, Congress's obvious intent was for such payment to benefit the participating tenant.

The Housing Authority also asserts that, unlike in Wright, when "resort to the HUD regulation was not necessary to establish the right," Plaintiffs-Appellants in the present case "must reach through the statute to find the right to a utility allowance schedule that is created by a regulation. . . ." Yet, once again, the statutory basis for private enforcement is even stronger here than it was in Wright. In fact, the Housing Authority's argument gets it exactly backwards.[39] The

37. 479 U.S. at 430 (emphasis added).

38. 42 U.S.C. § 1437a(a) (1982) (quoted in *Wright*, 479 U.S. at 420 n.2).

39. The argument overlooks the Supreme Court's statement in Wright that "it is clear that the regulations gave low-income tenants an enforceable right to a reasonable utility allowance. . . ." 479 U.S. at 420 (emphasis added). Contrary to the Housing Authority's assertion, therefore, resort to the HUD regulation was necessary to establish the right in Wright.

statutory language at issue in Wright made no mention at all of the utility allowance. It provided only for "rent," which was subsequently defined — by regulation — to include "reasonable amounts of utilities determined in accordance with the [public housing authority's] schedule of allowances for utilities supplied by the project."[40]

In contrast, the statutory language of the voucher program unmistakably provides — in the text of the act itself — for an "amount [to be] allowed for tenant paid utilities."[41] Contrary to the Housing Authority's assertion, the HUD regulations are not necessary to establish Plaintiff-Appellants' right to the utility allowance, and certainly no more so than they were in Wright, where such an allowance was not even mentioned in the text of the statute itself. Congress's intent to benefit Plaintiffs-Appellants here cannot be gainsaid.

(2) Enforcement Not Beyond Judicial Competence

The regulatory commands to public housing authorities — (1) to base the utility allowance "on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality . . . using normal patterns of consumption for the community as a whole and current utility rates,"[42] and (2) to "review [the] schedule of utility allowances each year, and

40. 24 C.F.R. § 860.403 (1982) (quoted in *Wright*, 479 U.S. at 420 n.3).

41. 42 U.S.C. § 1437f(o)(2)(A), (B).

42. 24 C.F.R. § 982.517(b)(1).

. . . revise [the] allowance for a utility category if there has been a change of 10 percent or more in the utility rate since the last time the utility allowance schedule was revised"[43] — are not beyond the competence of the judiciary to enforce. As the Supreme Court observed in *Wright*, "the regulations ... specifically set out guidelines that the [public housing authorities] were to follow in establishing utility allowances"; and the Court concluded that this mandate was not so vague and amorphous as to exceed the ability of the judicial branch to enforce.[44]

The Housing Authority argues further that the discretion it enjoys in calculating the utility allowance schedule renders the statute and regulations unenforceable in the courts. It characterizes as "inherently imprecise [the] task to determine the amorphous 'typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type' in Jefferson Parish." Although the calculation and maintenance of the utility allowance schedule may not be an exact science, courts surely are capable of at least reviewing the actions taken by public housing authorities to ensure that they have acted within their discretion.[45] Additionally, the requirement that public housing

43. Id. § 982.517(c)(1).

44. 479 U.S. at 431-32.

45. See *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 519-20, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990) ("That the [Boren] Amendment gives the states substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a

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authorities review their allowances each year and revise them "if there has been a change of 10 percent or more in the utility rate" since the last revision, admits of no discretion at all and could easily be determined and enforced by a court. In short, just as the Supreme Court held in *Wright*, we hold that the statute and regulations pertaining to the utility allowance are not so vague and amorphous as to be beyond the competence of the judiciary to enforce.

(3) Statute Unambiguously Imposes A Binding Obligation In Mandatory Terms

Together, the plain statutory provision for "the amount allowed for tenant-paid utilities," and, in turn, the wording of the implementing regulation specifying the method and calculation to be used in setting the allowance, unambiguously impose a binding obligation on public housing authorities. Referring our attention back to the first step of the analysis, the Housing Authority argues that somehow it is not bound by the obligation to maintain the utility allowance in conformity with the regulation, arguing that its only obligation is to HUD, and that it has none to program participants. This argument fails for the reasons we have already discussed.[46]

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court reviews whether the rates comply with the Amendment, but it does not render the Amendment unenforceable by a court. While there may be a range of reasonable rates, there certainly are some rates outside that range that no State could ever find to be reasonable and adequate under the Act.").

46. See supra text accompanying notes 40-43.

The Housing Authority next contends that its obligations are not binding because HUD may waive them for good cause.[47] This argument fails, however, for the simple reason that there is no record evidence (or contention) that the Housing Authority ever applied for any such waiver, much less received one. The regulations are binding on the Housing Authority unless and until HUD should grant it a waiver. Moreover, the extent of any waiver relating to the utility allowance that the Housing Authority might obtain would be restricted to the requirement that the Housing Authority revise the allowance when there is an annual utility rate increase of 10 percent or more: HUD has never provided for waivers of the other regulatory requirements that the Housing Authority is alleged to have violated.[48] The statute and regulations unambiguously impose binding obligations on public housing authorities vis-a-vis the calculation, maintenance, and revision of utility allowances.

(4) No Comprehensive Enforcement Scheme

Even when, as here, our analysis of the *Blessing* factors leads to the conclusion that Congress intended to create privately enforceable rights, "there is only a rebuttable presumption that the right is enforceable under § 1983."[49] This is because the possibility exists that Congress could have foreclosed that remedy by providing another.[50] "When

47. See HUD Notice 2005-9, at 3.

48. See id.

49. *Blessing*, 520 U.S. at 341.

50. Id.

the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."[51] The Housing Authority argues in its appellate brief that here, "the remedy for a [public housing authority's] failure to comply with HUD regulations ranges from a reduction in the amount of funds paid to [it] by HUD up to a complete termination from the program."[52] The Housing Authority advances further that even though the regulations require public housing authorities to provide an opportunity for informal hearings concerning the application of the utility allowance schedule to a particular family's needs, these regulations do not require such hearings concerning the establishment of the utility allowance schedule itself.[53]

As in Wright, however, there is absolutely no indication in the statute that Congress intended for exclusive enforcement authority to be vested in HUD.[54] "HUD's authority to audit, enforce annual contributions contracts, and cut off federal funds . . . are generalized powers [that] are insufficient to indicate a congressional intention to foreclose § 1983 remedies."[55] Both methods of enforcement,

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51. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981).

52. See 42 U.S.C. § 1437g(j)(4)(A).

53. See 24 C.F.R. § 982.555(b)(3).

54. See 479 U.S. at 424.

55. Id. at 428.

i.e., HUD oversight and private actions under § 1983, may coexist if Congress so intends. And, even though Gonzaga emphasized Pennhurst's observation that Spending Clause legislation is most often enforced by the withholding of federal funds rather than by private lawsuits,[56] the Court recognized and approved of Wright as an exception to this general rule. The Court reasoned that the lack of a sufficient federal review mechanism permitting tenants to complain of purported noncompliance weighed against a conclusion that Congress intended to preclude enforcement under § 1983.[57] Here, as acknowledged by the Housing Authority, voucher program participants are not entitled under the regulations to a hearing concerning establishment of the utility allowance schedule, and no other avenue of relief is provided. There simply is no comprehensive federal remedial scheme provided for the voucher program that would demonstrate Congressional intent to preclude Plaintiffs-Appellants' right to bring a § 1983 suit.

B. Banks v. Dallas Housing Authority

We turn briefly to the Housing Authority's contention that this case is not governed by Wright but by our decision in Banks v. Dallas Housing Authority, in which we considered

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56. "In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst*, 451 U.S. at 28).

57. See id. at 280, 290.

a different provision of the Housing Act and determined that it did not create a right enforceable under § 1983.[58] The Housing Authority's reliance on *Banks* is misplaced: The statutory provision at issue in that case does not even resemble the one that Plaintiffs-Appellants seek to enforce here. Banks dealt with an earlier version of 42 U.S.C. § 1437f(e), which authorized HUD to "make assistance payments . . . pursuant to a contract with owners . . . who agree to upgrade housing so as to make and keep such housing decent, safe, and sanitary. . . ."[59]

Banks is helpful in the present case only as a reference point along the continuum of decisions concerning § 1983 enforcement of asserted federal statutory rights. The obvious differences between the statutory provision considered in Banks and the one at issue here plainly put Banks at the opposite end of the spectrum, indeed very near Gonzaga.[60] Congress's requirement in the former § 1437f(e) that owners keep and maintain their properties "decent, safe, and sanitary" as a condition of their receipt of funds, is easily distinguished from its provision in § 1437f(o)(2) for a "monthly assistance

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58. 271 F.3d 605 (5th Cir. 2001).

59. 42 U.S.C. § 1437f(e) (1990) (quoted in *Banks*, 271 F.3d at 606, with emphasis).

60. Compare *Gonzaga*, 536 U.S. at 280 (emphasizing that in conditional spending legislation the typical remedy for state noncompliance with conditions is termination of federal funds), with *Banks*, 271 F.3d at 610 ("obligation is binding only in the sense that [it] is a condition that Congress placed upon the [landlord's] receipt of Section 8 rent assistance").

payment for the family," including a reasonable utility allowance, obviously a tangible government benefit that is directly focused on the family and its income. This provision much more closely resembles the Brooke Amendment at issue in Wright than it does the former § 1437f(e). Banks simply has no bearing on this case.

IV. CONCLUSION

We reverse the order of the district court dismissing Plaintiffs-Appellants' claim on grounds that they do not have a right to sue under § 1983 to enforce the statute and regulations concerning the calculation and revision of their utility allowances. Although the statutory provision sought to be enforced in this case and that involved in Wright are not the same verbatim, the differences between them are immaterial to the issue of § 1983 enforcement, and the Supreme Court's decision and reasoning in *Wright* control the outcome here. The Housing Authority's attempts to distinguish Wright, and to liken this case to our decision in *Banks*, are unpersuasive. Application of the Blessing factors bolsters our conclusion that the Congressional intent underlying the Brooke Amendment at issue Wright, as discerned by the Supreme Court, is equally present here. We hold that in adopting § 1437f(o)(2), Congress intended to grant to voucher program participants like these Plaintiffs-Appellants, federal rights enforceable under § 1983. For these reasons, the decision of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA FILED OCTOBER 28, 2004

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO: 04-1128
SECTION: "D" (3)

CATRICE JOHNSON, ET AL

VERSUS

HOUSING AUTHORITY OF JEFFERSON PARISH, ET AL

October 27, 2004, Decided
October 28, 2004, Filed;
October 28, 2004, Entered

OPINION

Before the court are the following motions:

(1) **"Motion to Dismiss Pursuant to *Rule 12(b)*"** filed by Defendants, Housing Authority of Jefferson Parish (HAJP), Louisiana Housing Development Corporation (LHDC), and Jeffrey Trahan, Executive Director of HAPJ; and

(2) **"Motion for Leave to File Second Amended and Supplemental Complaint"** filed by Plaintiffs.

Appendix B

The motions, set for hearing on Wednesday, October 13, 2004, are before the court on briefs, without oral argument. Now, having reviewed the memoranda of counsel and the applicable law, the court finds that the matter should be dismissed.

I. Background of this lawsuit

Plaintiffs are allegedly low-income tenants who live in Section 8 subsidized apartments and have vouchers provided under the federal Housing Choice Voucher program. Defendant, the Jefferson Parish Housing Authority (JPHA), allegedly receives federal funds to supplement the rent and the utility costs of these low income tenants. Defendant, Jeffrey Trahan, is allegedly the Executive Director of the JPHA,[1] and Defendant, the Louisiana Housing Development Corporation, was allegedly responsible for operating the Section 8 federally subsidized housing program for the JPHA.

In their First Amended Complaint, Plaintiffs claim that "the Jefferson Parish Housing Authority has not raised its utility allowances since 1995 even though rate hikes have caused utility costs to increase many times since then," and thus Plaintiffs "seek to enforce their right to have the Jefferson Parish Housing Authority ("JPHA") increase their utility allowance as required by federal law." (*See* Plaintiffs' First Amended Complaint, Doc. No. 2, P1).

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1. In their opposition to Defendants' Motion to Dismiss, Plaintiffs make clear that they sue Defendant Trahan in his official capacity only, not in his personal capacity. (Plaintiffs' Opp. at 3; *see also* Plaintiffs' proposed Second Amended Complaint at P6).

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More specifically, Plaintiffs contend that JPHA has not followed the mandate of 24 C.F.R. § 982.517(c) "to revise its allowance for a utility category if there has been a change of 10 percent or more from the rates on which such allowances were based." (*Id.* & Plaintiffs' Memorandum in Support of their Motion for Leave to File Second Amended and Supplemental Complaint, pp. 12, 14).

After Plaintiffs filed this suit on December 29, 2003, JPHA issued a revised Utility Allowance Schedule (effective March 15, 2004) which raised the total allowance for most apartment sizes and utility configurations. In their Motion for Leave to File Second Amended and Supplemental Complaint, Plaintiffs contend that even if JPHA is now using current utility rates (which Plaintiff do not concede), JPHA did not calculate allowances in accordance with the directive given in 24 C.F.R. § 982.517(b) to base allowances on "typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality," and Defendant made unrealistic assumptions about how well typical households are able to conserve energy and/or what are normal patterns of consumption. (*See* Plaintiff's Motion for Leave, pp. 5-6, *quoting* 24 C.F.R. § 982.517(b)).

And thus, if allowed to proceed under their proposed Second Amended Complaint, Plaintiffs are still seeking to enforce their alleged right to have the JPHA increase their utility allowances. Plaintiffs maintain that their actual utility costs greatly exceed and, absent judicial intervention, will continue to exceed the utility allowances afforded by Defendants.

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In bringing this suit, Plaintiff claim to "have a private right of action under the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*, to challenge defendants illegal failure to make payments and a private right of action under 42 U.S.C. § 1983 for deprivation of substantial federal rights under color of state law." (*See* Plaintiffs' First Amended Complaint at P25 & proposed Second Amended Complaint at P26).[2]

However, in response to Defendants' Motion to Dismiss, Plaintiffs concede that they cannot enforce the Annual Contributions Contract (ACC) between HUD and the Housing Authority because the ACC itself excludes third party rights. (*See* Plaintiffs' Opp. at 2, and ACC attached to Defendants' Motion to Dismiss). In their proposed Second Amended Complaint, Plaintiffs have deleted their claim based on their alleged status as third party beneficiaries to the ACC.

In their Motion to Dismiss now before the court, Defendants argue that:

> (1) the Housing Choice Voucher Program, 42 U.S.C. § 1437f, does not create an enforceable right to challenge the calculation of the utility allowance schedule;

---

2. In their First Amended Complaint, Plaintiffs also assert that they are third party beneficiaries of JPHA's contractual agreements with HUD to abide by the requirements of the Housing Act of 1937 and implementing regulations, and Defendants violated their contractual agreements with HUD thereby causing Plaintiffs to pay more rent than is required by law. (*See* Plaintiffs' First Amended Complaint at PP30-32).

(2) neither the Housing Choice Voucher Program, 42 U.S.C. § 1437f, nor 42 U.S.C. § 1983 creates a private right of action to enforce a particular calculation of the utility allowance schedule; and

(3) the standards set for determining utility allowance schedules leave wide discretion in the public housing agency and are incapable of judicial application and interpretation.

For reasons discussed below, the court finds that Defendants' arguments have merit.

II. Background of the Housing Choice Voucher Program

Pursuant to the Housing Act of 1937, Congress enacted various types of "Section 8" programs to provide an adequate supply of decent, affordable housing for low-income families. *See generally* 42 U.S.C. § 1437f; 24 C.F.R. § 982. The Secretary of Housing and Urban Development (HUD) funds the Section 8 programs, and the local Public Housing Authorities (PHAs) administer them.

The particular Section 8 program at issue here is the Housing Choice Voucher Program, which is tenant-based (as opposed to project-based) rental assistance. Under the program, qualified tenants pay a portion of their income to landlords and the public housing authorities, like the Housing Authority of Jefferson Parish, make additional assistance payments to the landlords with federal funds that are received from HUD. *See* 42 U.S.C. 1437f(b), (c) & (o).

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HUD is authorized to enter into an annual contributions contracts **(ACC)** with a public housing agency (PHA), which permits the PHA to obtain federal funding to enable low-income families to enter the housing market. 42 U.S.C. § 1437f(b)(1); 24 C.F.R. § 982.151.

The public housing agency in turn enters into a housing assistance payment **(HAP)** contract with the owner of the dwelling selected by the participant, and the public housing agency makes assistance payments directly to the landlord. 42 U.S.C. § 1437f(b)(1); 24 C.F.R. § 982.456.

Neither the **ACC** nor the **HAP** contract confers third party beneficiary rights on Housing Choice Voucher program participants. The language of the ACC contract (between HUD and a PHA) is mandated by HUD on Form HUD-52520, and paragraph 20 of the contract between HUD and HAJP provides:

> 20. Exclusion of Third Party Rights
>
> (a) A family that is eligible for housing assistance under this consolidated ACC is not a party beneficiary of the consolidated ACC.
>
> (b) Nothing in the consolidated ACC shall be construed as creating any right of any third party to enforce any provision of this consolidated ACC, or to assert any claim against HUD or the HA.

(*See* Defendants' Motion, Affidavit of Bobbie Robinson, Program Director for the Jefferson Parish Office LHDC & attached Exhibit 3, Consolidated Annual Contributions Contract, p. 4, § 20).

And by HUD regulation, 24 C.F.R. § 982.456, the HAP contract (between a PHA and owner) does not create any third party beneficiary rights:

> (b) (1) The family is not a party or third party beneficiary of the HAP contract . . . The family may not exercise any right or remedy against the owner under the HAP contract. . . .
>
> (c) The HAP contract shall not be construed as creating any right of the family or other third party (other than HUD) to enforce any provision of the HAP contract, or to assert any claims against HUD, the PHA or the owner under the HAP contract.

24 C.F.R. § 982.456.

An eligible participant in the Housing Choice Voucher program receives a voucher from a PHA and then must find a private landlord willing to accept the voucher. The rent the landlord requires generally may not exceed by more than 10% the fair market rental levels established periodically by HUD. 42 U.S.C. § 1437f(c)(1). The fair market rental value adopted by HUD includes the cost of utilities. 24 C.F.R. § 982.4(b).

Under the voucher program, codified at 42 U.S.C. § 1437f(o), HUD provides assistance to the PHAs for tenant-based assistance using a payment standard that is between 90 percent and 110 percent of the fair market rent for the area served by the housing agency. 42 U.S.C. § 1437f(o)(1)(B); 24 C.F.R. § 982.503(b). The payment standard is subject to approval and review by HUD. 42 U.S.C. § 1437f(o)(1)(D&E).

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Families who receive assistance through the Housing Choice Voucher program are required to pay a minimum monthly rent in an amount to be determined by the housing agency "of not more than $ 50 per month." 42 U.S.C. § 1437f(o)(2); 42 U.S.C. § 1437a(a)(3). Subject to this requirement, the monthly assistance payment for a family receiving assistance under the voucher program shall be determined as follows:

(A) Tenant-based assistance, rent not exceeding payment standard

For a family receiving tenant-based assistance, if the rent for the family (including the amount allowed for **tenant-paid utilities**) does not exceed the applicable payment standard established under paragraph (1), the monthly assistance payment for the family shall be equal to the amount by which the rent (including the amount allowed for **tenant-paid utilities**) exceeds the greatest of the following amounts, rounded to the nearest dollar:

(i) 30 percent of the monthly adjusted income of the family.

(ii) 10 percent of the monthly income of the family.

(iii) If the family is receiving payments for welfare assistance from a public agency and a

> part of those payments, adjusted in accordance with the actual housing costs of the family, is specifically designated by that agency to meet the housing costs of the family, the portion of those payments that is so designated.

(B) Tenant-based assistance, rent exceeding payment standard

> For a family receiving tenant-based assistance, if the rent for the family (including the amount allowed for **tenant-paid utilities**) exceeds the applicable payment standard established under paragraph (1), the monthly assistance payment for the family shall be equal to the amount by which the applicable payment standard exceeds the greatest amounts under clauses (i), (ii), and (iii) of subparagraph (A).

42 U.S.C. § 1437f(o)(2) (emphasizing tenant-paid utilities).[3]

3. Participants in the voucher program are able to choose a dwelling that rents for more than the payment standard, but the family must pay that excess rent as part of the family share. However, the public housing agency "may not give approval for the family of the assisted tenancy" until the PHA has determined that the following requirement has been met:

> At the time a family initially receives tenant-based assistance for occupancy of a dwelling unit, and where the gross rent of the unit exceeds the applicable payment standard for the family, the family share does not exceed 40 percent of the family's monthly adjusted income.

24 C.F.R. § 982.305(a)(5). *See also* 42 U.S.C. § 1437f(o)(3)("40 percent limit").

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The portion of rent and utilities paid by the family is known as the "family share," and it is calculated by subtracting the amount of the housing assistance payment from the gross rent. 24 C.F.R. § § 982.4(b) & 982.515(a). "Gross rent" is the sum of the rent to owner plus any **utility allowance.** 24 C.F.R. § 982.4(b) (emphasis added).

The definition of "utility allowance" is found in 24 C.F.R. § 5.603(b), which provides:

> **Utility allowance.** If the cost of utilities (except telephone) and other housing services for an assisted unit is not included in the tenant rent but is the responsibility of the family occupying the unit, an amount equal to the estimate made or approved by a PHA or HUD of the monthly cost of a reasonable consumption of such utilities and other services for the unit by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthy living environment.

24 C.F.R. § 5.603(b).

Further, HUD instructs public housing authorities participating in the Housing Choice Voucher program, how to maintain and determine a utility allowance schedule through its regulation, 24 C.F.R. § 982.517, which provides:

> (a) Maintaining schedule.
>
> (1) The PHA must maintain a utility allowance schedule for all tenant-paid utilities (except

telephone), for cost of tenant-supplied refrigerators and ranges, and for other tenant-paid housing services (e.g., trash collection (disposal of waste and refuse)).

(2) The PHA must give HUD a copy of the utility allowance schedule. At HUD's request, the PHA also must provide any information or procedures used in preparation of the schedule.

(b) How allowances are determined.

(1) The utility allowance schedule must be determined based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality. In developing the schedule, the PHA must use normal patterns of consumption for the community as a whole and current utility rates.

(2) (i) A PHA's utility allowance schedule, and the utility allowance for an individual family, must include the utilities and services that are necessary in the locality to provide housing that complies with the housing quality standards. However, the PHA may not provide any allowance for non-essential utility costs, such as costs of cable or satellite television.

(ii) In the utility allowance schedule, the PHA must classify utilities and other housing services

according to the following general categories: space heating; air conditioning; cooking; water heating; water; sewer; trash collection (disposal of waste and refuse); other electric; refrigerator (cost of tenant-supplied refrigerator); range (cost of tenant-supplied range); and other specified housing services. The PHA must provide a utility allowance for tenant-paid air-conditioning costs if the majority of housing units in the market provide centrally air-conditioned units or there is appropriate wiring for tenant-installed air-conditioners.

(3) The cost of each utility and housing service category must be stated separately. For each of these categories, the utility allowance schedule must take into consideration unit size (by number of bedrooms), and unit types (e.g., apartment, row-house, town house, single-family detached, and manufactured housing) that are typical in the community.

(4) The utility allowance schedule must be prepared and submitted in accordance with HUD requirements on th form prescribed by HUD.

24 C.F.R. § 982.517(a) & (b).

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HUD also requires a public housing agency to revise its utility allowance schedule pursuant to 24 C.F.R. § 982.517(c), which provides:

> (c) Revisions of utility allowance schedule.
>
> (1) A PHA must review its schedule of utility allowances each year, and must revise its allowance for a utility category if there has been a change of 10 percent or more in the utility rate since the last time the utility allowance schedule was revised. The PHA must maintain information supporting its annual review of utility allowances and any revisions made in its utility allowance schedule.
>
> (2) At HUD's direction, the PHA must revise the utility allowance schedule to correct any errors, or as necessary to update the schedule.

24 C.F.R. § 982.517(c).

While HUD requires that a PHA give a participant family an opportunity for an informal hearing to consider whether the PHA's "determination of the appropriate utility allowance (if any) for tenant-paid utilities from the PHA utility allowance schedule" are in accordance with the law, HUD regulations and PHA policies, the PHA is not required to provide a participant family an opportunity for an informal hearing for the "establishment of the PHA schedule of utility allowances for families in the program." 24 C.F.R. § 982.555(a)(1)(ii) & (b)(3).

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In this lawsuit, Plaintiffs challenge the Housing Authority of Jefferson's failure to revise, properly calculate and/or increase the utility allowance schedule. However, as the court next discusses, Plaintiffs have no right to make such a challenge.

III. Neither the Housing Choice Voucher program, 42 U.S.C. § 1437f(o), nor its implementing regulations, namely 24 C.F.R. § 982.517, afford Plaintiffs an enforceable right to challenge the HAJP's determination of the utility allowance schedule through 42 U.S.C. § 1983.

"Section 1983 creates a cause of action against a state actor who deprives a person 'of any rights, privileges, or immunities secured by the Constitution and laws.' 42 U.S.C. § 1983. Although most § 1983 claims involve constitutional violations, the provision also applies to rights created by federal statutes." *Banks v. Dallas Housing Authority*, 271 F.3d 605, 609 (5th Cir. 2001).

However, "in order to seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340-41, 117 S. Ct. 1353, 1359, 137 L. Ed. 2d 569 (1997).

In *Blessing*, the Court set forth three "factors" to guide judicial inquiry into whether or not a statute confers a right enforceable through § 1983:

> (1) Congress must have intended the provision in question benefit the plaintiff;

> (2) the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its judicial enforcement would strain judicial competence; and
>
> (3) the statute must unambiguously impose a binding obligation on the States, i.e., "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms."

Blessing v. Freestone, 520 U.S. 329, 340-41, 117 S. Ct. 1353, 1359, 137 L. Ed. 2d 569 (1997).

Although courts, including the Fifth Circuit,[4] have historically applied the three factors in *Blessing* as a "three-part test," the *Gonzaga* Court clarified that its language in *Blessing* should not be read "to suggest that something less than an unambiguously conferred right is enforceable by § 1983." *Gonzaga*, 536 U.S. at 282, 122 S. Ct. at 2275.

The *Gonzaga* Court found that the *Blessing* Court may have created some confusion because in the same paragraph that the *Blessing* Court set forth its three factors, the Court emphasized that "it is only violations of *rights*, not *laws*, which give rise to § 1983 actions." *Id.*, 536 U.S. at 283, 122 S. Ct. at 2275. The *Gonzaga* Court explained that:

> This confusion has led some courts to interpret *Blessing* as allowing plaintiffs to enforce a statute

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4. *See e.g. Banks v. Dallas Housing Authority*, 271 F.3d 605 (5th Cir. 2001), discussed infra, text, pp. 17-19).

> under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect; something less than what is required for a statute to create rights enforceable directly from the statute itself under an implied right of action. Fueling this uncertainty is the notion that our private right of action cases have no bearing on the standard for discerning whether a statute creates rights enforceable by § 1983. *Id.*

The *Gonzaga* Court then expressly rejected the notion that its cases "permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Gonzaga University v. Doe*, 536 U.S. 273, 283, 122 S. Ct. 2268, 2275, 153 L. Ed. 2d 309 (2002). "Accordingly it is *rights*, not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of that section." *Id.*

The Court also recognized that both the inquiry into whether a statutory violation may be enforced through § 1983 and the inquiry into whether a private right of action can be implied from a particular statute overlap in one meaningful respect— "in either case, we must first determine whether Congress *intended to create a federal right*." *Id.*, 536 U.S. at 283, 122 S. Ct. at 2275.

For a statute to create private rights, its text must be "phrased in terms of the persons benefitted." *Id.*, 536 U.S. at 284, 122 S. Ct. at 2275. "Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.*, 536 U.S. at 286, 122 S. Ct. at 2277.

Further, "even where a statute is phrased in . . . explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent "to create not just a private *right* but also a private *remedy*." *Id.*, 536 U.S. at 284, 122 S. Ct. at 2275-76.

A. In *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987), the Supreme Court found that tenants living in low-income housing projects could enforce alleged violation of a rent-ceiling provision of the Housing Act through § 1983.

Plaintiffs rely heavily on *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987), to support their argument that here they have an enforceable right to challenge the calculation of the utility allowance schedule and have it increased. The Housing Act provision at issue in *Wright*, 42 U.S.C. § 1437a(a), is different from the provisions at issue here, and it provided that "tenants could be charged as rent no more and no less than 30 percent of their income."[5] *Wright*, 479 U.S. at 430, 107 S. Ct. at 773-74.

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5. Section 1437a(a), which was the subject of *Wright*, expressly excludes participants in the Housing Choice Voucher program (§ 1437f(o)). The rent-ceiling provision of § 1437a(a)(1) now reads:

> Dwelling units assisted under this chapter shall be rented only to families who are low-income families at the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. Except as provided in paragraph (2) and subject to the

(Cont'd)

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The *Wright* Plaintiffs, who were housing project tenants (unlike the Plaintiffs here who live in private housing through the voucher program), sought to challenge the housing authority's surcharge for "excess" utility consumption. The *Wright* Plaintiffs claimed that the surcharge should have been part of their rent and to make them pay the surcharge "deprived them of their statutory right to pay only the prescribed maximum portion of their income as rent." *Wright*, 479 U.S. at 421-22, 107 S. Ct. at 769.

(Cont'd)

> requirement under paragraph (3), a family **shall pay rent** for a dwelling unit assisted under this chapter **(other than a family assisted under section 1437f(o)** or (y) or paying rent under section 1437f(c)(3)(B) of this title) the highest of the following amounts:
>
> (A) 30 per centum of the family's monthly adjusted income;
>
> (B) 10 per centum of the family's monthly income; or
>
> (C) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing cots, the portion of such payments which is so designated.

42 U.S.C § 1437a(a)(1)(emphasis added). Thus, the provision involved in *Wright*, cannot be used by Plaintiffs here as the basis of a federal right to support a § 1983 claim.

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The Court agreed finding that the subject rent-ceiling provision unambiguously conferred a "mandatory limitation focusing on the individual family and its income." *Id.*, 479 U.S. at 430, 107 S. Ct. at 766. As the Court later explained in *Gonzaga*, the key to its inquiry in *Wright* "was that Congress spoke in terms that 'could not be clearer,' and conferred entitlements 'sufficiently specific and definite to qualify as enforceable rights. . . .'" *Gonzaga*, 536 U.S. at 280, 122 S. Ct. at 2273 (citations omitted).

B. In *Banks v. Dallas Housing Authority*, 271 F.3d 605 (5th Cir. 2001), the Fifth Circuit found that tenants could not enforce alleged Section 8 violations through § 1983.

In *Banks v. Dallas Housing Authority*, 271 F.3d 605 (5th Cir. 2001), the statute at issue was yet a different provision of the Housing Act, i.e., former 42 U.S.C. § 1437f(e), which provided that public housing authorities could make assistance payments to only those property owners "who agreed to upgrade housing so as to make and keep such housing decent, safe, and sanitary." *Banks*, 271 F.3d at 608.

The Fifth Circuit conducted a *Blessing* analysis[6] and concluded that former 42 U.S.C. § 1437f(e) did not create a

6. As the court previously discussed in the text, *supra*, pp., the *Blessing* Court set forth three "factors" to guide judicial inquiry into whether or not a statute confers a right enforceable through § 1983:

> (1) Congress must have intended the provision in question benefit the plaintiff;

(Cont'd)

federal right enforceable under § 1983. In applying the first Blessing factor, the court found that "to the extent § 1437f(e) confers a benefit upon residents of public housing, the provision operates in an indirect and attenuated manner," and concluded that "Congress enacted § 1437f(e) for the purpose of placing conditions upon property owners' receipt of assistance payments, not to confer a benefit upon tenants of public housing." *Banks*, 271 F.3d at 609-10.

And in *Gonzaga*, the Court clarified that its language in *Blessing* should not be read "to suggest that something less than an unambiguously conferred right is enforceable by § 1983." *Gonzaga*, 536 U.S. at 282, 122 S. Ct. at 2275.

In applying the second *Blessing* factor, the Fifth Circuit distinguished *Wright* and found that the plaintiffs' asserted right to "decent, safe, and sanitary" public housing was too vague to be judicially enforceable. *Id.* at 610. The court reasoned that:

(Cont'd)

> (2) the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its judicial enforcement would strain judicial competence; and
>
> (3) the statute must unambiguously impose a binding obligation on the States, i.e., "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms."

Blessing v. Freestone, 520 U.S. 329, 340-41, 117 S. Ct. 1353, 1359, 137 L. Ed. 2d 569 (1997).

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> [The subject Housing Act provision in *Wright*, i.e., Section 1437a] provided that "tenants could be charged as rent no more and no less than 30 percent of their income." The Court pointed out that this mandatory provision "could not be clearer" and that it was "focused on the individual family and its income." The specificity of § 1437a, coupled with its focus on the tenants, suggested that Congress intended to create a right enforceable under § 1983. In this case, on the other hand, the imprecision of the alleged statutory right to "decent, safe, and sanitary" housing suggests that Congress did not intend to create a judicially enforceable right.

Id. at 610 (citations omitted).

And, in applying the third *Blessing* factor, the Fifth Circuit found that "the owner's statutory obligation to maintain decent housing runs to the public housing authorities, not to the residents of the housing project" and that the "obligation is binding only in the sense that proper maintenance of the rental units is a condition that Congress placed upon receipt of Section 8 rent assistance. *Id.* at 610.

C. Here, the court finds that Plaintiffs cannot enforce alleged Section 8 violations through § 1983, because the provisions at issue do not unambiguously confer upon them the rights they seek to enforce.

Plaintiff's First Amended Complaint and proposed Second Amended Complaint do no specifically identify which sections of "42 U.S.C. § 1437 *et seq.*" create federal rights. Their causes of action generally refer to Defendants'

alleged violations of 42 U.S.C. § 1437 *et seq.* and its "implementing regulations," which have allegedly caused Plaintiffs to pay more rent than is required by law.

In their opposition to Defendants' Motion to Dismiss, Plaintiffs argue that as Section 8 Housing Choice Voucher program tenants, they have "a right under 42 U.S.C. § 1983 to enforce the federal statute and regulations which specify how and when Public Housing Authorities must calculate the subsidies to which these tenants are entitled, including a utility allowance." (Plaintiffs' Opp. at 3). Plaintiffs further clarify their position, that it is under 42 U.S.C. § 1437f(o)(2) (the statutory provision that governs the amount of monthly assistance payments the PHA's make to landlords), and its implementing regulation, 24 C.F.R. § 982.517 (which sets forth how a PHA determines the utility allowance schedule), that Plaintiffs have such a right. (Plaintiffs' Opp. at 16-20).

However, the court finds that while Congress may well have intended tenants in the Housing Choice Voucher Program to receive a benefit from the statutory formula set forth in 42 U.S.C. § 1437f(o)(2), Congress did not intend to create a federal right to bring the type of challenges that Plaintiffs make in this case, including the challenge to the calculation of monthly assistance payments under § 1437f(o)(2) and the challenge to the determination of the utility allowance schedule under 24 C.F.R. § 982.517.

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***42 U.S.C. § 1437f(o)(2)* - "Amount of Monthly Assistance Payment"**

In essence, 42 U.S.C. § 1437f(o)(2) sets forth how the "monthly assistance payment" for the family must be calculated.[7] The monthly assistance payment is paid by the

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7. The text of 42 U.S.C. § 1437f(o)(2), quoted in the text of this Minute Entry, *supra* pp. 8-9, is again quoted here for easy reference:

> **(A) Tenant-based assistance; rent not exceeding payment standard**
>
> For a family receiving tenant-based assistance, if the rent for the family (including the amount allowed for tenant-paid utilities) does not exceed the applicable payment standard established under paragraph (1), the monthly assistance payment for the family shall be equal to the amount by which the rent (including the amount allowed for tenant-paid utilities) exceeds the greatest of the following amounts, rounded to the nearest dollar:
>
> (i) 30 percent of the monthly adjusted income of the family.
>
> (ii) 10 percent of the monthly income of the family.
>
> (iii) If the family is receiving payments for welfare assistance from a public agency and a part of those payments, adjusted in accordance with the actual

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PHA to the landlord. While the Plaintiffs fall within the general zone of interest that this statute is intended to protect, the statutory language does not contain the sort of rights-creating language which reveals Congressional intent to permit Plaintiffs to challenge the calculation of the monthly assistance payment set forth in the statute.

In short, the statute simply does not "unambiguously confer [a] right to support [Plaintiffs'] cause of action under § 1983." *Gonzaga*, 536 U.S. at 283, 122 S. Ct. at 2275. And a general claim that a statute creates an enforceable right is not sufficient to support a claim for deprivation of civil rights under § 1983. *Blessing*, 520 U.S. at 346.

(Cont'd)

> housing costs of the family, is specifically designated by that agency to meet the housing costs of th family, the portion of those payments that is so designated.
>
> **(B) Tenant-based assistance; rent exceeding payment standard**
>
> For a family receiving tenant-based assistance, if the rent for the family (including the amount allowed for tenant-paid utilities) exceeds the applicable payment standard established under paragraph (1), the monthly assistance payment for the family shall be equal to the amount by which the applicable payment standard exceeds the greatest amounts under clauses (i), (ii), and (iii) of subparagraph (A).

42 U.S.C. § 1437f(o)(2).

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> In *Wright* . . . we held that tenants of public housing projects had a right to have their utility costs included within a rental payment that did not exceed 30 percent of their income. We did not ask whether the federal housing legislation gave rise to rights; rather, we focused our analysis on a specific statutory provision limiting 'rent' to 30 percent of a tenant's income. *Id.* at 342.[8]

Unlike the statute in Wright, the statute here (42 U.S.C. § 1437f(o)(2)) is not phrased using right-creating language, but rather is framed as a command on how the monthly assistance payments are to be determined.

***24 C.F.R. § 982.517* - "Utility Allowance Schedule"**

Plaintiffs submit that HUD regulation, 24 C.F.R. § 982.517, "is at the heart of this case."[9] (*See* Plaintiffs' Opp.

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8. The text of the rent-ceiling provision of the Public Housing Act at issue in *Wright*, which stated that a low-income family **"shall pay as rent"** a specified percentage of its monthly income for publicly assisted housing, was "phrased in terms of the persons benefited" and "explicitly conferred specific monetary entitlements upon the plaintiffs." *Gonzaga*, 536 U.S. at 280, 284, 122 S. Ct. at 2274, 2275.

Unlike the statute in *Wright*, the statute here (42 U.S.C. § 1437f(o)(2)) is not phrased using right-creating language, but rather is framed as a command on how the monthly assistance payments are to be determined.

9. Pertinent portions of 24 C.F.R. § 982.517, quoted in the text of this Minute Entry, *supra* pp. 10-12, are again quoted here for easy reference:

(Cont'd)

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(Cont'd)

(a) Maintaining schedule.

(1) The PHA must maintain a utility allowance schedule for all tenant-paid utilities (except telephone), for cost of tenant-supplied refrigerators and ranges, and for other tenant-paid housing services (e.g., trash collection (disposal of waste and refuse)).

(2) The PHA must give HUD a copy of the utility allowance schedule. At HUD's request, the PHA also must provide any information or procedures used in preparation of the schedule.

(b) How allowances are determined.

(1) The utility allowance schedule must be determined based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality. In developing the schedule, the PHA must use normal patterns of consumption for the community as a whole and current utility rates.

(2) (i) A PHA's utility allowance schedule, and the utility allowance for an individual family, must include the utilities and services that are necessary in the locality to provide housing that complies with the housing quality standards. However, the PHA may not provide any allowance for non-essential utility costs, such as costs of cable or satellite television.

(Cont'd)

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(ii) In the utility allowance schedule, the PHA must classify utilities and other housing services according to the following general categories: space heating; air conditioning; cooking; water heating; water; sewer; trash collection (disposal of waste and refuse); other electric; refrigerator (cost of tenant-supplied refrigerator); range (cost of tenant-supplied range); and other specified housing services. The PHA must provide a utility allowance for tenant-paid air-conditioning costs if the majority of housing units in the market provide centrally air-conditioned units or there is appropriate wiring for tenant-installed air-conditioners.

(3) The cost of each utility and housing service category must be stated separately. For each of these categories, the utility allowance schedule must take into consideration unit size (by number of bedrooms), and unit types (e.g., apartment, row-house, town house, single-family detached, and manufactured housing) that are typical in the community.

(4) The utility allowance schedule must be prepared and submitted in accordance with HUD requirements on th form prescribed by HUD.

(c) Revisions of utility allowance schedule.

(1) A PHA must review its schedule of utility allowances each year, and must revise its allowance

(Cont'd)

at p. 10). However, at the outset, the court questions whether this regulation can on its own accord create an enforceable right under § 1983. *Banks*, 271 F.3d at 610 n.4 ("the existence of specific HUD regulations should not be relevant to the overriding question whether Congress intended to create a federal right enforceable through § 1983").[10]

As the four dissenting Justices observed in *Wright*, the decision did not reach the question whether an agency could create a right. In fact, the dissent noted that the notion that

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> for a utility category if there has been a change of 10 percent or more in the utility rate since the last time the utility allowance schedule was revises. The PHA must maintain information supporting its annual review of utility allowances and any revisions made in its utility allowance schedule.
>
> (2) At HUD's direction, the PHA must revise the utility allowance schedule to correct any errors, or as necessary to update the schedule.

24 C.F.R. § 982.517(a)-(c).

10. The court notes that *Wright* permitted plaintiffs to maintain a § 1983 action for violation of the *Brooke Amendment* and its regulations. The Brooke Amendment imposes a *statutory* limit on rent charged to low-income public housing tenants, and HUD promulgated regulations that defined the term "rent" to include reasonable utility costs. Although the Court in *Wright* permitted the plaintiffs to maintain an action under § 1983, the Court looked to the regulations at issue only to interpret the statutory right conferred on tenants by Congress.

the HUD regulations at issue could create a right by their own force was "troubling" when there was no "indication in the language, legislative history, or administrative interpretation of the Brooke Amendment that Congress intended to create an enforceable right to utilities." *Wright*, 479 U.S. at 438, 107 S. Ct. 766 (O'Connor, J., dissenting).

In any event, assuming administrative regulations alone could crate a right enforceable in a § 1983 action, 24 C.F.R. § 982.517 focuses on what the PHA must do in determining the utility schedule allowance, rather than containing the unambiguous rights-creating text required under *Gonzaga* to allow Plaintiff to challenge the calculation of the utility schedule allowance and have it increased. *Gonzaga*, 536 U.S. at 286-87, 122 S. Ct. 2268.

Further, the standards set forth in 24 C.F.R. § 982.517 regarding how utility schedule allowances are to be determined, are subject to the exercise of wide discretion to the public housing agency, thereby making it difficult or impossible to determine whether a violation occurred.[11] Moreover, the language of the regulation is cast as an overall

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11. Indeed, pursuant to HUD's own regulations, the PHA is not required to provide a participant family an opportunity for an informal hearing for the "establishment of the PHA schedule of utility allowances for families in the program." 24 C.F.R. § 982.555 (b)(3). Thus, because the PHA retains complete discretion in establishing the utility schedule allowance, the court concludes that HUD views the determination of the utility schedule allowance "as a question for local housing authorities [and] not a matter of federal entitlement." *Wright*, 479 U.S. at 435, 107 S. Ct. at 776 (O'Connor, J., dissenting).

standard, rather than as a method for determining utility allowance for particular tenants, making it impossible to fashion appropriate relief for individual plaintiffs if there was a violation. *Wright*, 479 U.S. at 438-39, 107 S. Ct. at 778 (O'Connor, J., dissenting). Thus, the court concludes that the rights Plaintiffs assert are protected by 42 U.S.C. § 1437f (o)(2) and its implementing regulation, 24 C.F.R. § 982.517, simply defy judicial enforcement.

Finally, Congress has made no provision that would allow participants in the Housing Choice Voucher program to usurp HUD's supervisory control over a public housing agency's calculation of the utility allowance schedule. Rather, Congress specifically made provision for the States to receive funding for the Housing Choice Voucher program through an annual contribution contract (ACC). *See* 42 U.S.C. § 1437f(b)(1), quoted *supra* p.

HUD regulations control the ACC, and require a public housing agency "to administer the program in accordance with HUD regulations and requirements." 24 C.F.R. § 982.151(a). And pursuant to both the ACC between HUD and the Housing Authority of Jefferson Parish, and the Housing Assistance Payment (HAP) contract between the Housing Authority of Jefferson Parish and the landlord, third party rights are specifically excluded. (*See* discussion, *supra* pp. 6-7, regarding exclusion of third-party rights under both the ACC and HAP contract).

IV. Conclusion

For reasons set forth above,

IT IS ORDERED that Defendants' **"Motion to Dismiss Pursuant to *Rule 12(b)*"** be and is hereby **GRANTED;** and

IT IS FURTHER ORDERED that Plaintiffs' **"Motion for Leave to File Second Amended and Supplemental Complaint"** be and is hereby **DENIED.**

* * * *

A. J. McNamara

APPENDIX C — HUD NOTICE 2005-9

U.S. Department of Housing and Urban Development

Office of Public and Indian Housing

Special Attention of:
Section 8 Public Housing Agencies; State and Area Office Directors of Public Housing; Section 8 8 Financial Management Center; Regional Directors; State and Area Coordinators
Notice PIH 2005-9 (HA)
Issued: February 25, 2005
Expires: February 28, 2006

Cross References: HUD Notice PIH 2005-1 (HA) Implementation of the Consolidated Appropriations Act (HR 4818 – H Rept 108-792), 2005 Funding Provisions for the Housing Choice Voucher Program

Subject: Public Housing Agency (PHA) Flexibility to Manage the Housing Choice Voucher Program in 2005

1. *Purpose.* This Notice provides guidance on administrative flexibility and actions PHAs may take to reduce costs in the Housing Choice Voucher Program ("the voucher program") in accordance with the Consolidated Appropriations Act, 2005 (Public Law 108-447).

2. *Background and Discussion of Appropriations Act Conference Report.* Notice PIH 2005-1, issued December 8, 2004, provides guidance on implementation of the Consolidated Appropriations Act, 2005 ("the Act") provisions for the voucher program. On December 9, 2004,

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HUD broadcast a webcast presentation on the FY 2005 funding for the voucher program, and HUD staff conducted numerous follow-up conferences with PHAs in various locations across the country.

As PHAs must manage their programs within the amounts budgeted for the calendar year, and may have to implement various cost-savings measures, the Conference Report (H. Rpt. 108-792) accompanying the Act provides guidance on the administrative flexibility given to HUD and PHAs to manage the voucher program within a fixed budget and with certain limitations. The Conference Report states, in relevant part:

> "HUD shall provide all public housing agencies (PHAs) with a fixed, annual budget that each agency must manage their voucher programs within for 2005 . . . This new structure is designed to provide flexibility for PHAs to manage their voucher programs, so long as such flexibility meets current legal requirements and PHAs manage within their annual budgets. This could include lowering eligible rents in order to expand utilization to no greater than their authorized levels. PHAs are expected to manage utility costs, decreased tenant contributions and protect the most at-risk families within these budgets."
>
> "HUD shall also provide agencies with flexibility to adjust payment standards and portability policies as necessary to manage within their 2005 budgets. Agencies shall ensure that current elderly

and disabled voucher families be protected against significant impacts resulting from adjustments made by agencies to maintain their voucher programs within their 2005 budgets."

The local PHA has the discretion to define "significant impacts" resulting from adjusting payment standard and portability policies. For example, a PHA may opt to define "significant impacts" as termination of assistance, or to expand the local list of results that are deemed as "significant impacts".

3. *PHA Actions to Reduce Voucher Program Costs.* Based on the 2005 Appropriations Act Conference Report language, as well as existing authority under the voucher program regulations at 24 CFR Part 982, possible PHA cost-saving actions are described below, by topic. Some of these actions are necessary just to ensure compliance with program requirements (e.g., ensuring that owner rents are reasonable) and should be taken by all PHAs, irrespective of whether the PHA is experiencing financial difficulties. This is not intended to be an exhaustive list of permissible PHA cost savings actions.

a. *Payment Standards.* The PHA may opt to lower payment standards. In the tenant-based rental voucher program, a lower payment standard applies immediately to all new admissions, all movers, and stayers with a new HAP contract (e.g., when the owner offers or requires a new lease). For all other tenant-based rental voucher participants, decreased payment standard amounts

are not applied until the second regular reexamination after the payment standard is lowered. The delayed applicability of a lower payment standard is a regulatory, not statutory, requirement. PHAs experiencing financial difficulties may request HUD to waive this requirement, for good cause. Such waiver requests should be sent directly to HUD Headquarters to the attention of Dr. Alfred C. Jurison at 451 7th Street, S.W., Room 4210, Washington, D.C. 20410.

PHA requests to approve payment standards below 90 percent of the Fair Market Rent may be approved by HUD field offices. However, §982.503(d) states that HUD will not approve such payment standard amounts if the family share for more than 40 percent of voucher participants exceeds 30 percent of monthly adjusted income. This is a regulatory, not statutory, requirement. PHAs experiencing financial difficulties may request HUD to waive this requirement, for good cause. Such waiver requests should be sent directly to HUD Headquarters to the attention of Dr. Alfred C. Jurison at 451 7th Street, S.W., Room 4210, Washington, D.C. 20410.

PHA regulatory waiver requests concerning payment standards must provide justification for the waiver. For example, a PHA may have insufficient funding to continue to assist current participants within the 2005 funding amounts at

current payment standards. In such a situation, a PHA may be required to more quickly impose lower payment standards in order to maintain an appropriate level of service. PHA waiver requests should, at a minimum, include the calculation the PHA used to arrive at the projected shortfall in funding, after factoring in anticipated turnover of vouchers, as well as any cost savings measures the PHA has already taken or will take in the future. In addition, PHAs must include the actions they have taken to protect "at risk" families, the current rent burden to families prior to the implementation of the lower payment standard, and an affirmative statement that the implementation of the waiver will allow the PHA to manage its programs within its budgetary allocation.

The regulatory waiver considerations above are only applicable to the tenant–based rental voucher program.

b. *Utility Allowances.* The PHA may review utility allowances to determine if they are too high. Changes in utility allowances may be implemented immediately, but not later than the next regularly scheduled reexamination of family income.

Section 982.517(c) of the voucher regulations requires PHAs to revise utility allowances whenever there is a utility rate increase of ten percent or more. This is a regulatory, not statutory, requirement. PHAs experiencing financial difficulties may request HUD

to waive this requirement, for good cause. Such waiver requests should be sent directly to HUD Headquarters to the attention of Dr. Alfred C. Jurison at 451 7th Street, S.W., Room 4210, Washington, D.C. 20410.

c. *Portability and Moves Within the PHA Jurisdiction.* The PHA may opt to deny portability moves, and moves within the PHA jurisdiction, if the PHA does not have sufficient funds under its calendar year 2005 budget to subsidize families that move to a higher cost area or unit. "Higher cost area" is defined as an area where a higher subsidy amount will be paid for a family because of higher payment standard amounts or "more generous" subsidy standards (e.g., the receiving PHA issues a 3-bedroom voucher to a family that received a 2-bedroom voucher from the initial PHA). This is a denial to move for insufficient funding under §982.314(e)(1). In such cases, the PHA must determine that based on its current funding level, it has insufficient funds to pay for higher subsidy amounts for families wishing to move to more expensive areas or units. Note also that in the case of portability moves, the PHA would need to contact the receiving PHA and confirm that the receiving PHA will not absorb the family. If the receiving PHA is willing to absorb, there are no grounds to deny the portability move under §982.314(e)(1). PHAs do not need a regulatory waiver from HUD to make a determination in order to deny such moves.

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d. *ACC Reserves.* Starting in calendar year 2005, the Department will no longer exercise its option to establish and maintain an Annual Contributions Contract (ACC) reserve account for the voucher program pursuant to 24 CFR 982.154. PHAs are provided a fixed amount of funds to assist as many families as possible, provided that on December 31, 2005 the number of unit months leased for the calendar year does not exceed the cumulative number of unit months available for the same period.

As discussed in HUD Notice PIH 2005-1, HUD will move to reduce existing ACC reserves (attributable to funding prior to 2005) to no more than a one-week level in order to meet the calendar year 2005 rescission. The Conference Report states: "The conferees direct that a portion of this rescission be met by reducing public housing agencies' program reserves to no more than one week as assumed in the budget request" (it is important to note that the Department's 2005 budget request was premised on passage of the Flexible Voucher Program proposal and not the current unit based program).

In order to determine the amount of ACC reserves subject to recapture, HUD will start with a PHA's ACC reserve balance in the latest approved Year-End Settlement Statement (form HUD-52681), and will update the PHA's reserve balance through December 31, 2004 using Voucher Management

System (VMS) data to arrive at the PHA's pre-2005 ACC reserve balance. To the extent a PHA's eligible Housing Assistant Payment (HAP) expenses for the period January 1, 2005 through March 31, 2005 exceed its approved budgetary allocation for the same time period, HUD will reduce the reserve to arrive at the PHA's final pre-2005 reserve balance.

HUD will then calculate the equivalent of one week of eligible HAP expenses, based on the November 2004 through January 2005 VMS information, and recapture the excess of final pre-2005 ACC reserves over one week of eligible HAP expenses.

e. *Ensuring Reasonable Rents.* PHAs do not have to wait until the Housing Assistance Payments (HAP) contract anniversary date to review owner rents and reduce them if warranted. The PHA must determine whether the rent to owner is a reasonable rent in comparison to rent for other comparable unassisted units in accordance with the regulations at §982.507(b) and the HAP contract. The PHA should ensure that owner rents do not exceed the amount being charged by the owner for unassisted units in the same building or complex. The initial rent and all rent increases must comply with any State or local rent control limits. Further, any owner leasing promotions for unassisted tenants (e.g., the initial 2 months of occupancy are "rent free") must be taken into consideration in determining rent reasonableness.

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The PHA must provide written notice, in accordance with the HAP contract, to the owner before reducing unreasonable rents. Rents may be reduced as early as the first of the following month. If the rent to owner is not reasonable as most recently determined by the PHA, the owner must reduce the rent to the reasonable amount or the HAP contract must be terminated. In such cases, the family will be issued a voucher to find a new unit, and any lower payment standard or correction to the family unit size would be applicable immediately.

Even if an owner's rent is reasonable, a PHA could request the owner to voluntarily agree to a temporary rent reduction or defer a rent increase to avoid termination of family assistance and HAP contract termination. It is the owner's option to agree to such measures.

f. *Termination of Assistance Due to Insufficient Funding*. The PHA may terminate HAP contracts, in accordance with HUD requirements, if the PHA determines that "funding under the consolidated ACC is insufficient to support continued assistance for families in the program" (§982.454).

PHA termination policies due to insufficient funding should be added to the administrative plan. Such policies should describe how the PHA will determine which HAP contracts will be terminated. Any PHA policies with respect to the resumption of assistance for the impacted families must also be included in the administrative plan.

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Before terminating HAP contracts on the basis of insufficient funding, the PHA needs to ensure that the determination of such fact is documented.

4. *Other Possible PHA Policies to Reduce Costs.*

a) *Voucher Issuance.* Stop issuing turnover vouchers or pull back outstanding vouchers for applicants searching for housing (that have not yet resulted in an executed HAP contract).

b) *Subsidy Standards.* Revise "overly generous" subsidy standards to reduce bedroom size eligibility. A subsidy standard of two persons per bedroom, regardless of sex or age, is acceptable. An efficiency subsidy standard (0-bedroom unit) for single person households is acceptable. If a family leases a unit larger than the unit size on the voucher, ensure that the payment standard is based on the lower of the voucher unit size or the actual unit size leased. If the family size is reduced after admission, ensure that the correct the payment standard is used. An "empty nester" single individual living in a 3-bedroom unit should have a 0- or 1-bedroom payment standard, not a 3-bedroom payment standard. If the unit size for which the family is eligible changes during the term of the HAP contract, the "new" unit size is applicable at the first regular reexamination following the change (§982.505(b)(5)).

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c) *Minimum Rent.* Increase the minimum rent to $50. The effective date for the increased minimum rent is dependent upon PHA policy. A PHA could institute a policy for increases in family contribution to be effective immediately, before the next reexamination.

d) *Family Income Matching/Verification and Other Anti-Fraud Efforts.* Accelerate efforts concerning income matching and income verification. PHAs could notify families that enforcement action could be taken where underreporting of income is discovered.

e) *Interim Reexaminations.* Require families to report all increases in income between reexaminations, and conduct more frequent interim income reviews for families reporting no income. The effective date of an annual or interim reexamination of family income is dependent upon PHA policies.

Any questions concerning this Notice should be directed to Dr. Alfred C. Jurison, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, at (202) 708-0477. This is not a toll-free number.

/s/

Michael Liu, Assistant Secretary for Public and Indian Housing